STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of MARY MASSEY, Deceased.

JAMES E. MCCARTY, Personal Representative of the Estate of MARY MASSEY, Deceased,

Appellee,

and

DAVID MASSEY,

Petitioner-Appellee,

v

CANDICE MASSEY,

Respondent-Appellant.

UNPUBLISHED
July 28, 1998

No. 200405
Wayne Probate Court
LC No. 94-538106-SE

Before: Jansen, P.J., and Kelly and Markey, JJ.

PER CURIAM.

Respondent Candice Massey appeals as of right from an order of the probate court declaring the existence of a settlement and dismissing her and petitioner David Massey's continuing litigation relating to disposal of the estate of their mother, decedent Mary Massey. We reverse and remand for further proceedings.

The parties have engaged in a protracted dispute concerning the administration of the decedent's estate, their shares of inheritance under the will, and whether certain personal property is part of the probate estate.

At a motion hearing in November 1996, counsel for the parties discussed possibilities for settling several issues, after which petitioner prepared an order dismissing the case with prejudice under

the terms discussed at the hearing. At a hearing on petitioner's motion for entry of the proposed order, held in December 1996, the probate court concluded that the parties had settled the case and accordingly signed the order.

Respondent argues on appeal that the probate court erred in regarding the statements of counsel at the November 1996 hearing as manifesting assent to a settlement, in presuming that respondent's lawyer had special authority to bind her to a settlement in any event, and in enforcing a settlement that was not executed in writing according to the procedures set forth in MCL 700.191(1); MSA 27.5191.

Whether counsel for the parties had reached a settlement agreement and so stated in open court is a question of fact that this Court reviews under the clearly erroneous standard of review. MCR 2.613(C); MCR 2.507(H).

At the November 1996 proceeding, counsel for petitioner stated that he and counsel for respondent "have reached agreement, we believe." Petitioner's counsel then announced, "First, I'd like to recite for purposes of the discovery motions the following stipulation," after which counsel addressed matters concerning the deposition of petitioner and answers to respondent's request to admit and interrogatories. Petitioner's counsel then stated:

> The third part of our stipulation is that mediation will be adjourned to the next mediation cycle. We are holding open for a period of two weeks an offer of settlement in the amount of $35,000.00 for a determination of how this amount will be paid.
>
> And finally Your Honor, with respect to the fabric, we are going to hold that issue open pending possible settlement resolution by the parties in this matter.

Asked by the probate court if he agreed with petitioner's representations, respondent's counsel replied, "That's my understanding," then discoursed briefly on the discovery issue. The probate court finished by saying, apparently to petitioner, "why don't you draft an order that includes all of this, make sure both of you agree to it and then submit it to my office . . . ."

At the December 1996 hearing, petitioner's counsel argued that the parties had entered into a binding settlement, and that respondent failed to comply with its terms. Respondent's counsel replied that at the earlier hearing the parties placed on the record only the general outline of a settlement, the particulars of which remained to be resolved, then explained that respondent had not agreed to the terms that petitioner had proposed.

MCR 2.507(H) provides as follows:

> An agreement or consent between the parties or their attorneys respecting the proceedings in an action, subsequently denied by either party, is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney.

Because there is no dispute that respondent signed no written settlement proposal, the propriety of the probate court's insistence that respondent abide by the terms of the proposed settlement depends on respondent's having in fact agreed to the settlement in open court. We hold that the probate court clearly erred in finding that the statements of counsel in court constituted acceptance of a settlement.

Petitioner's counsel indicated the tentative nature of the understanding reached, saying that he and opposing counsel had "reached agreement, we believe," and anticipated further discovery, mediation, and settlement resolution required to resolve the controversies completely. Similarly, respondent's counsel's only indication of assent was to say "[t]hat's my understanding" when asked if he agreed with opposing counsel's representations, respondent's counsel then going on to address concerns relating to further discovery. At best, counsel for the parties merely agreed to agree. Because counsel for both parties envisioned further proceedings, clearly neither intended the statements then on the record to constitute a final resolution of the case. Further, the probate court's own request for a written order, to "make sure both of you agree to it," indicates that the probate court likewise did not then understand a complete and final settlement to have been reached. The probate court clearly erred in finding that the parties had agreed to a settlement in open court.

Underscoring the error is the lack of any indication in the record that respondent had authorized her lawyer to settle the case on her behalf. An attorney may not compromise the client's cause of action absent special authority to do so. *Michigan Nat'l Bank v Patmon*, 119 Mich App 772, 775; 327 NW2d 355 (1982), citing *Henderson v Great Atlantic & Pacific Tea Co*, 374 Mich 142, 132 NW2d 75 (1965). Special authority or subsequent ratification is necessary to make such a compromise valid and binding on the client. *Nelson v Consumers Power Co*, 198 Mich App 82, 86; 497 NW2d 205 (1993).

Because we reverse on the ground that respondent did not agree to the proposed settlement, we need not reach the question whether the settlement was void for want of a writing as dictated by MCL 700.191(1); MSA 27.5191.

We reverse the judgment of the probate court and remand this case with instructions to vacate the order of dismissal. On remand, petitioner may attempt to rehabilitate the proposed settlement by presenting evidence that respondent has ratified the settlement or induced other parties reasonably and detrimentally to rely on it. Jurisdiction is not retained.

/s/ Kathleen Jansen
/s/ Michael J. Kelly